

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1978

No. 78-161

STATE OF IOWA, STATE CONSERVATION COMMISSION
of the STATE OF IOWA,

Petitioners,

ROY TIBBALS WILSON, CHARLES E. LAKIN,

FLORENCE LAKIN, R. G. P. INCORPORATED,

DARRELL L. HAROLD, HAROLD M. AND LUEA SORENSON,

HAROLD JACKSON, OTIS PETERSON AND

TRAVELERS INSURANCE COMPANY,

Respondents (Petitioners on Separate Petitions)

VS.

OMAHA INDIAN TRIBE AND THE UNITED STATES OF AMERICA,

Respondents.

BRIEF OF AMICUS CURIAE

State of California in Support of the
State of Iowa's Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

EVELLE J. YOUNGER,

Attorney General of the State of
California,

N. GREGORY TAYLOR,

Assistant Attorney General,

JOHN BRISCOE,

Deputy Attorney General,

BRUCE S. FLUSHMAN,

Deputy Attorney General,
State Building, Room 6000,
San Francisco, California 94102,
Telephone: (415) 557-1152

*Attorneys for Amicus Curiae
State of California.*

Supreme Court, U. S.

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State of Iowa's Petition for a Writ of Certiorari

to the United States Court of Appeals

for the Eighth Circuit

AUTHORITY TO FILE AMICUS CURIAE BRIEF

The State of California, by and through its State Lands
Commission and by and through its Attorney General,
Evelle J. Younger, respectfully submits this brief as amicus

curiae under authority of Rule 42(4), United States Supreme Court Rules. This brief is submitted in support of the Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit filed by the State of Iowa and the State Conservation Commission of the State of Iowa.

INTEREST OF AMICUS CURIAE

Notwithstanding this Court's recent, unequivocal affirmation of the Equal-Footing Doctrine, the decision below divested the State of Iowa of title to lands underlying the Missouri River, lands which devolved upon Iowa as a sovereign upon admission to the Union in 1846. In the course of its decision, breaching another incident of Iowa's sovereignty, the Court employed "federal common law" to ascertain the boundaries of lands wholly within the boundaries of the State. These acts of the Court below, if allowed to stand, could severely impinge on the sovereignty of California. For in the same capacity as the other States, California holds in trust for all its citizens title to millions of acres of sovereign lands. And in California too are millions more acres of land whose private titles since statehood have been the unquestioned province of California courts, whose landowners have relied for more than a hundred years on the continued application to their titles of California law. California is also a party to litigation concerning hundreds of miles of the Colorado River where the principles of this case could have marked effect. California is thus vitally interested in the outcome of this case.

As with all other States admitted after the formation of the Union, California acquired as an attribute of sovereignty title to the lands underlying navigable waters within its boundaries upon admission to statehood. *State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 370 (1977) (hereinafter "Corvallis"); *Weber v. Harbor Commissioners*, 18 Wall. 57, 65 (1873). An additional, and no less indispensable incident of its sovereignty is "... the power of the State's courts to determine and apply state property rules in the resolution of conflicting claims to that property." *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313, 323 (1973) (Stewart, J., dissenting; the views of Mr. Justice Stewart were adopted when the Court overruled *Bonelli* in *Corvallis*, *supra*, 429 U.S. at 381-382). In this case, the Eighth Circuit's novel construction of Title 25 U.S.C. section 194 (hereinafter "Section 194"), and its asserted application of federal common law in an area properly determined by state law will, if the writ of certiorari is not granted, jeopardize principles at the very foundation of federalism, the Tenth Amendment to the Constitution and the Equal-Footing Doctrine.

The ramifications of the Eighth Circuit's decision are vast. The choice-of-law principles adopted and application of the presumption purportedly created by Section 194 by the Court of Appeals, if not overturned, will, in sovereign land title cases concerning Indian claims, affect sovereign land titles held in millions of acres of land in every State of the Union, titles held by the States in trust for their citizens. The States' sovereign title and their trust obligations have been established in our jurisprudence since *Pollard's Lessee v. Hagan*, 3 How. 212 (1845). Cases of the

States' sovereign rights in land have long been considered among the most important controversies before the Court, "... either as ... respects the amount of property involved, or the principles on which the ... judgment proceeds" *Id.* at 235 (Catron, J., dissenting.)

For the reasons briefed below, the State of California respectfully requests that its contentions be considered with the petition for certiorari filed by the State of Iowa and the Iowa Conservation Commission (hereinafter "Iowa").

BRIEF OF AMICUS CURIAE

QUESTIONS PRESENTED

1. Whether the selection of federal common law to determine land title breaches the Tenth Amendment to the Constitution.

2. Whether the presumption created by Title 25, U.S.C., section 194, as applied by the Eighth Circuit to the sovereign State of Iowa, is inconsistent with the Equal-Footing Doctrine or the Tenth Amendment to the Constitution.

SUPPLEMENTARY STATEMENT OF THE CASE

The United States Court of Appeals for the Eighth Circuit reversed judgment in favor of Iowa and other non-Indian claimants quieting title to lands in the present bed of the Missouri River and other lands directly east thereof (hereinafter "Barrett Survey Area") against the Omaha Indian Tribe ("Omahas") and the United States, acting as trustee for the Omahas.

In December, 1846, Iowa was admitted to the Union with, *inter alia*, its western boundary adopted as the center of the main channel of the Missouri River. In March, 1854, eight years after Iowa had acquired title to the Missouri River *east* of its main channel and the concomitant authority to apply its own property law to lands within its borders, the Omahas entered into a treaty with the United States. In that treaty the Omahas ceded certain lands to the United States and reserved "... for their future home ..." other lands acceptable to the Omahas not to exceed 300,000 acres bounded on the *east* by the main channel of the Missouri River. Act of March 16, 1854, Art. 1, 10 Stat. 1043. Those reserved lands included the Barrett Survey Area then located in the Territory of Nebraska, *west* of the center of the main channel of the Missouri River.

By 1943, however, the uncontrollable Missouri River had wandered more than two miles west of its assumed location in 1854. As a result the Barrett Survey Area formerly located on the *west* (Nebraska) side of the Missouri River was now located on the *east* (Iowa) side of the Missouri River. The dispute in this case is whether the movement of Missouri, the boundary of the Omahas' reservation, was the result of the gradual and imperceptible process of accretion and erosion, as asserted by Iowa and the non-Indian claimants, or the sudden and perceptible process of avulsion, as claimed by the Omahas and the United States.

Essentially, Iowa and the non-Indian claimants aver that the Barrett Survey Area was washed away by gradual river action, and that the lands now located in the Barrett Survey Area are alluvial depositions to Iowa riparian

land and that by this process the Omaha reservation boundary moved. The non-Indian claimants or their predecessors in interest had occupied the land from the early 1900's until April 2, 1975, when the Omahas, with assistance of the Bureau of Indian Affairs, seized possession of the land and began farming it.

Thereafter, the Omahas brought suit to quiet title to the Blackbird Bend area now lying in Monoma County, Iowa. Iowa and the non-Indian claimants asserted title to that same area and also sought to quiet title thereto.

At trial, the District Court determined that each side would bear the burden of persuasion as to the facts establishing their respective claims, disregarding Section 194, which the Omahas and the United States claimed reallocated such burden to Iowa and the non-Indian claimants. *United States v. Wilson*, 433 F.Supp. 57, 66 (N.D. Iowa, 1977) (hereinafter "Wilson I"). The District Court found that the river, and hence the boundary of the Omahas' reservation, moved westward through the process of accretion and erosion as contended by Iowa and the non-Indian claimants. It further found that the United States and the Omahas failed to prove that the river moved by any sudden change. Title to the Barrett Survey Area was therefore quieted in Iowa and the non-Indian claimants. *United States v. Wilson*, 433 F.Supp. 67, 88-92 (N.D. Iowa, 1977) (hereinafter "Wilson II").

On appeal, the Eighth Circuit applied Section 194, having found historical possession or ownership, by treaty, to the lands within the Barrett Survey Area as such lands ex-

isted in 1854. In so doing the Court of Appeals disputed the District Court's reasoning that to apply Section 194 would require, before all the evidence had been heard, a determination on the merits—that the river had changed by avulsion; for if it had changed otherwise the Indians' title would have continued to be bounded by the river. *Wilson I*, *supra*, 433 F.Supp. at 66. Thus, pursuant to Section 194, Iowa and the non-Indian claimants were required to assume the burden of proving the reservation boundary shifted by reason of accretion. *Omaha Indian Tribe, Treaty of 1854, etc. v. Wilson*, 575 F.2d 620, 650-651 (8th Cir., 1978) (hereinafter "Wilson III"). Holding further that Iowa and the non-Indian claimants failed to sustain what it recognized as "indeed an onerous burden" of proving events occurring over 100 years ago, the Court of Appeals vacated the District Court's judgment and remanded the case with directions to enter judgment quieting title to the Barrett Survey Area—including river lands in the present bed of the Missouri River, east of the main channel—in the Omahas and the United States as trustee. *Id.* at 651.

REASONS FOR GRANTING THE WRIT

1. The writ should be granted to consider whether the selection of federal common law to determine land title breaches the Tenth Amendment to the Constitution.

The classic expression of the force of the Tenth Amendment is found in *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938). In that case, Justice Brandeis, after setting forth the reasons for the decision and the background of the

rule of *Swift v. Tyson*, 16 Pet. 1 (1842), wrote for the Court:

"Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State . . . There is no federal general common law. Congress has no power to declare substantive rules of common law in a state . . . and no clause in the Constitution purports to confer such a power upon the federal courts . . . [In applying the doctrine of *Swift v. Tyson*] . . . *this Court and the lower courts have invaded rights which in our opinion are reserved by the Constitution to the several States.*" *Id.* at 78-80. (Emphasis added.)

One of the principal aims of *Erie* was to avoid ". . . inequitable administration of the laws." *Hanna v. Plummer*, 380 U.S. 460, 468 (1965). The rule of *Erie* is fully applicable in cases, such as the present, in which federal jurisdiction is invoked on the basis that the action is brought by the United States (28 U.S.C. section 1345) and an Indian tribe (28 U.S.C. section 1362). See *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 591 (1973). It is an element of the Constitutional sovereignty of the States. *Corvallis, supra*, 429 U.S. at 381; *Bonelli Cattle Co., supra*, 414 U.S. at 333 (Stewart, J., dissenting).

In a line of cases extending from *Pollard's Lessee v. Hagan*, 3 How. 212 (1845), through *Corvallis, supra*, this Court has held that determinations concerning land title are matters for the application of state law. See, e.g., *Barney v. Keokuk*, 94 U.S. 324 (1876); *Packer v. Bird*,

137 U.S. 661 (1891); *St. Louis v. Rutz*, 138 U.S. 226 (1891); *Shively v. Bowlby*, 152 U.S. 1 (1894).

And that these are matters of state law is the rule in cases of Indian lands as well. *Oklahoma v. Texas*, 258 U.S. 574, 594-595 (1922); *United States v. Oklahoma Gas Co.*, 318 U.S. 206 (1943); *Herron v. Choctaw & Chickasaw Nations*, 228 F.2d 830 (10th Cir., 1956); See *Francis v. Francis*, 203 U.S. 233 (1906).

The Eighth Circuit grounded its decision to employ federal common law on two purported bases: first, the fact that an interstate boundary was "concerned"; second, "the special relationship between the United States and the Omaha Indian Tribe and the nature of the interest litigated." *Wilson III, supra*, 575 F.2d at 628, 629. As to the Court's first reason, the fact that the center of the river was once the Nebraska-Iowa boundary in no way suggests that federal law apply to cases of land title on either side of that boundary. Quite the opposite is true:

"How land that emerges on either side of an interstate boundary stream shall be disposed of as between public and private ownership is a matter to be determined according to the law of each state, under the familiar doctrine that it is for the states to establish for themselves such rules of property as they deem expedient with respect to the navigable waters

¹The Eighth Circuit based this conclusion on a statement in *Corvallis, supra*, 429 U.S. at 375. That statement was only dictum in *Corvallis*, in which no interstate boundary was involved; and the statement was recognized by the Court's opinion to be applicable only in a severely limited class of cases—original-jurisdiction cases involving disputes between two states over an interstate boundary. *Id.*

within their borders and the riparian lands adjacent to them. [Citation omitted.]” *Arkansas v. Tennessee*, 246 U.S. 158, 175-176 (1918).²

See also *Nebraska v. Iowa*, 406 U.S. 117, 126-127 (1972). Since federal common law controls the interstate boundary, and state law the boundaries of private titles, there may well be two systems of boundaries when federal law and state law treat river changes differently. The Eighth Circuit’s assumption that any claimed change in the eastern boundary of the reservation would concern the boundary between Iowa and Nebraska, requiring the application of federal law, *Wilson III*, *supra*, 575 F.2d at 628, is thus plainly mistaken. Moreover, the fact that the interstate boundary had long been fixed in location by compact renders the Eighth Circuit’s reasoning on this point even less tenable. Iowa-Nebraska Boundary Compact of 1943, Iowa Code 1971, p. lxiv; Iowa Acts 1943, c. 306; Nebraska Laws 1943, c. 130; Act of July 12, 1943, 57 Stat. 494; see *Nebraska v. Iowa*, *supra*, 406 U.S. at 119-120.

The Eighth Circuit’s other reason for choosing federal law—the “special relationship” between the Omahas and the Government and the “nature of the interest litigated”—is also ill chosen.³ The Court’s reasoning conflicts

²The one qualification to this fact, to which the Court alludes obliquely, is inapplicable here. *Wilson III*, *supra*, 575 F.2d at 628. See also footnote 1.

³The Court announced its result in advance when it intemperately characterized defendants’ claims as an “attempt to extinguish the aboriginal rights of the Omaha Indian Tribe, guaranteed by treaty. . . .” *Wilson III*, *supra*, 575 F.2d at 629. Such a characterization begs the very question, *viz.*, precisely what are those rights, or more specifically, what is the eastern boundary of the reservation?

with this Court’s opinions in *Oklahoma v. Texas*, *supra*, 258 U.S. at 594-95, and *U.S. v. Oklahoma Gas Co.*, *supra*, 318 U.S. at 209-210, holding that land-title questions concerning Indian tribal lands held under the guardianship of the United States are to be determined by the law of the state in which the lands lie. The decision further conflicts with the Tenth Circuit Court of Appeals’ decisions in *United States v. Champlin Refining Co. et al.*, 156 F.2d 769, 773 (10th Cir., 1946) and *Herron v. Choctaw & Chickasaw Nations*, *supra*, 228 F.2d at 832 (10th Cir., 1956), to the same effect. The *Oklahoma Gas* case does suggest an exception to the rule if necessary to protect “. . . a less favored people against their own improvidence or the overreaching of others . . .” *id.* at 211, but application of the exception was not conceived to be necessary when Indians are subjected to the same rule of law as are others in the state. *Id.*

This Court of Appeals’ holding also conflicts with another Eighth Circuit decision (unconvincingly distinguished by the panel, *Wilson III*, *supra*, 575 F.2d at 629) upholding a District Court determination that state, not federal law, should govern a case involving the very same Omahas, the identical reservation and claims of accretion along the Missouri River, the boundary of that reservation. *Fontenelle v. Omaha Tribe of Nebraska*, 430 F.2d 143 (8th Cir., 1970), affirming *Fontenelle v. Omaha Tribe of Nebraska*, 298 F.Supp. 855, 861 (D. Neb., 1969).

Finally, amicus contends that the Eighth Circuit’s ruling also conflicts with this Court’s opinion in *Francis v.*

Francis, 203 U.S. 233 (1906). That case addressed the issue whether fee title to land passed pursuant to a treaty between the United States and a tribe of Indians in the absence of a patent. In resolving the issue, this Court looked to the law of the State in which the reservation lay to see how courts of that State construed the treaty and whether that construction had become a rule of property in that State which, the Court held, should not be disturbed unless it clearly misinterpreted the treaty. *Id.* at 242. In this case, the choice-of-law determination by the Eighth Circuit ignored the applicable state rule of property—requiring the person who seeks to quiet title to prevail on the strength of his own title—a rule that does no violence to the terms of the Omahas Treaty. *Wilson I*, *supra*, 433 F.Supp. at 66.⁴

The Omahas' claims under that treaty must be interpreted according to the law of the State in which the reservation land lies. *Oklahoma v. Texas*, *supra*, 258 U.S. at 594-595.

The result of the Eighth Circuit's choice of federal law in Indian land-title disputes will lead to the inequitable administration of land titles in all states. A new scheme of federal common law for land title questions about Indian lands will be created side by side with the scheme of land title created by state law applicable to non-Indian lands.

The Court of Appeals choice-of-law determination shat-

⁴Even if federal law were applicable, the Court of Appeals ignores this Court's requirement that parties claiming material changes in rivers, such as avulsions, carry the burden of proving them. *Oklahoma v. Texas*, 260 U.S. 606, 638 (1923).

ters the principles of *Erie*. It ignores or conflicts with decisions not only in the Tenth Circuit and in this Court, but also in the Eighth Circuit itself. Further, the choice-of-law determination was made without any showing either of a significant conflict between some federal policy and the use of state law, or of a reason that state law should not govern the disposition of real property situated in that State. See *Wallis v. Pan American Pet. Corp.*, 384 U.S. 63, 69 (1966). That state law shall govern these dispositions is one of the elements of a State's sovereign rights reserved to the States by the Tenth Amendment. In addition, there was no indication that the Omahas were being subjected to a different rule of law from other citizens of Iowa. See *Oklahoma Gas Co.*, *supra*, 318 U.S. at 211.

2. **The writ should be granted to determine whether the presumption created by operation of Title 25, U.S.C. Section 194, as applied by the Eighth Circuit to the sovereign State of Iowa, is in violation of the Equal-Footing Doctrine or the Tenth Amendment.**

The Eighth Circuit's application of Section 194—in land-title litigation concerning sovereign river lands brought against a sovereign State by the United States and an Indian tribe—is unprecedented and bears close scrutiny because its effect is to divest the State of sovereign lands guaranteed by the Equal-Footing Doctrine. Moreover, in applying Section 194, the Court of Appeals ignored a presumption of ownership in favor of the sovereign in navigable rivers.

Section 194 provides that in trials between an Indian and a white person concerning property, the burden of

proof is placed on the white person “. . . whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership.” The Eighth Circuit found that the “. . . [Omahas] treaty established the [Omahas] as the legal titleholder to the land area within the Barrett Survey [Area, including lands in present bed of the Missouri River claimed to be sovereign lands of Iowa.] *Wilson III*, *supra*, 575 F.2d at 631. This finding, the Court held, raised the presumption of title required by Section 194. *Id.*

Having found “previous possession or ownership”⁵ based upon physical conditions in 1867, in the Eighth Circuit held

“... notwithstanding the subsequent movement of the thalweg of the Missouri River, the non-Indian claimants were required to assume the burden of proof to show that the Indians no longer had lawful title to the reservation land in question.” *Wilson III*, *supra*, 575 F.2d at 633.

Thus, Iowa was required to prove the Omahas did not have lawful title to the bed of the Missouri River east of present main channel, land *prima facie* sovereign lands of Iowa.

This case is further aggravated because the United States, which has immunized itself from quiet-title actions concerning such lands, 28 U.S.C. 2409a(a), was able to

⁵It is not clear whether mere “aboriginal” title can constitute the previous possession or ownership sufficient to raise the presumption of title in an Indian tribe. “Aboriginal” possession or ownership is the non-treaty right of occupancy recognized by the United States in the nomadic Indian tribes, protected by the United States from third party intrusion and terminable only by the United States. See *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 279 (1955). Amicus does not understand “aboriginal” title to be involved in this case.

initiate this litigation and by operation of Section 194 saddled Iowa and the non-Indian claimants with the burden of proving their case, disregarding the plaintiff’s traditional burden of proof. *Wilson I*, *supra*, 433 F.Supp. at 66; *Wilson II*, *supra*, 433 F.Supp. at 88. The shift of the burden is made despite the fact that the United States and the Indians are claiming the Missouri River moved by process of avulsion, a material change this Court has required the party asserting it to prove. *Oklahoma v. Texas*, *supra*, 260 U.S. at 638. Significantly, the Court itself euphemistically characterized this burden it imposed on Iowa and the non-Indian claimants as one that “may result in undesirable hardships.” *Wilson III*, *supra*, 575 F.2d at 651.

Perhaps not the least of the evils of the decision, however, is its treatment of the presumption as effectively a conclusive one. The Eighth Circuit cavils with, distinguishes and disputes the non-Indian claimants’ expert testimony on accretion, and grants no weight whatever to the District Court’s findings of accretion. It was the District Court, of course, that heard and saw the expert witnesses and rendered a thorough, reasoned opinion. The Court of Appeals merely reviewed the “cold record” and picked and chose from the evidence what is desired. Such a novel method of review conflicts with the standard set by the Ninth Circuit, which has held that once there exists “substantial and valid evidence” to enable the trier of fact to conclude accretion has occurred, the issue is not available in the Court of Appeals unless clearly erroneous. *Beaver v. United States*,

350 F.2d 4, 7 (9th Cir., 1965). Further, the Eighth Circuit, by its construction and treatment of the burden of persuasion and of the evidence, seems to require absolute proof of the non-Indian claimants' theory of accretion when all that has ever been required in river cases is "... [a] degree of certainty that is reasonable as a practical matter, having regard to the circumstances" *Arkansas v. Tennessee*, 269 U.S. 152, 157 (1925).

Finally the Eighth Circuit entirely ignores in its considerations an important presumption in Iowa's favor. Dominion over navigable waters and the soils under them

"... [is] so identified with the sovereign power of government that a presumption against [its] separation from sovereignty must be indulged" *United States v. Oregon*, 295 U.S. 1, 14 (1934).

Moreover, requiring Iowa to prove ownership of river lands lying east of the present main channel of the Missouri River, lands prima facie sovereign, based on a shift in the burden of proof created by applying a federal statute contravenes "... an unbroken line of cases which make it clear that the title acquired by the State [to lands underlying navigable waters by virtue of the Equal-Footing Doctrine] is absolute so far as any federal principle of land title is concerned." *Corvallis*, supra, 429 U.S. at 374. (Emphasis supplied.) These federal principles of land title to which Iowa's sovereign title were subjected are inconsistent with the Equal-Footing Doctrine.

Further, the Court of Appeals' creation of an almost concededly insurmountable burden of proof upon the State of Iowa, ignores the "... absolute title of the States to the

beds navigable waters ... ," *id.*, and the presumption created by the Equal-Footing Doctrine against a separation of such title from the sovereign. *United States v. Oregon*, supra, 295 U.S. 1 at 14. Thus, the Court of Appeals' treatment of the evidence is inconsistent with the Equal-Footing Doctrine.

Another aspect of the Equal-Footing Doctrine is the right of the sovereign to have cases concerning title to sovereign lands adjudicated in accordance with and subject to the laws of the sovereign. *Corvallis*, supra, 429 U.S. at 378. This is clearly an incident of the State's sovereignty, *Bonelli Cattle Co.*, supra, 414 U.S. at 323 (*Stewart, J.*, dissenting). By shifting the burden of persuasion and by treating the presumption in favor of the Indians as effectively conclusive, the Court of Appeals deprived Iowa of the sovereign right to have its title adjudged in accordance with the laws of Iowa. Thus, the effect of the Eighth Circuit's ruling is inconsistent with the Tenth Amendment preserving such powers in the States.

If allowed to stand, the Eighth Circuit's decision will in untold instances affect the States' constitutional title to lands underlying navigable waters within their boundaries provided by the Equal-Footing Doctrine. It will also cast serious doubt upon the rule laid down first in *Pollard's Lessee v. Hagan*, and most recently in *Corvallis* that such title is absolute insofar as any federal principles of land title are concerned. *Corvallis*, supra, 429 U.S. at 374-377. In so doing, such ruling will in great measure vitiate the Tenth Amendment to the Constitution and the Equal-Footing Doctrine.

CONCLUSION

Amicus respectfully submits that this is an exceedingly important case to the States of the Union because of its implications for essential elements of the States' sovereignty—their right to apply their own laws of land title to lands within their boundaries, and their constitutional title to lands underlying navigable waters held in trust for all citizens of their States. Because of conflicts with longstanding principles of constitutional law announced by this Court and by other Courts of Appeal, and because of the importance of the issues of this case, amicus respectfully requests that the writ of certiorari, prayed for by Iowa, be granted.

EVELLE J. YOUNGER,
Attorney General of the State of
California,

N. GREGORY TAYLOR,
Assistant Attorney General,

JOHN BRISCOE,
Deputy Attorney General,

BRUCE S. FLUSHMAN,
Deputy Attorney General,
Attorneys for Amicus Curiae
State of California.